Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-901

MR. ANDREW WOODS, *Petitioner,*

v.

SAFEWAY STORES, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-

MR. ANDREW WOODS, *Petitioner*,

v.

SAFEWAY STORES, INC., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Mr. Andrew Woods, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this action on July 24, 1978, as to which rehearing was denied on September 6, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, reported at 579 F.2d 43, affirming the judgment of the District Court is printed as Appendix A. The Order of the Court of Appeals denying rehearing is printed as Appendix B. The opinion of the United States District Court for the Eastern District of Virginia, reported at 420 F.Supp. 35, is printed as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 24, 1978 (Appendix A). Petitioner's timely petition for rehearing and suggestion for rehearing *en banc* was denied on September 6, 1978 (Appendix B).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the court below, in affirming the judgment of the District Court, erred when it upheld the respondent's racially discriminatory treatment of petitioner without a showing that the treatment was justified on grounds of "business necessity".

2. Whether the court below should have required a compelling justification for petitioner's discharge rather than accepting respondent's articulation of a "business purpose" as a sufficient defense.

3. Whether respondent sustained its burden by articulating a "business purpose" and by showing that petitioner was the only black employee discharged on account of a physical characteristic peculiar to his race.

4. Whether the court below should have found that a less discriminatory alternative existed.

STATUTE INVOLVED

The statutory provision involved is Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a)(1), which provides as follows:

> "It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . ."

STATEMENT OF THE CASE

This case raises significant questions as to the meaning and enforcement of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-*et seq.* Petitioner contends that the respondent-employer, the Nation's largest chain of retail grocery stores, discriminated against him in violation of Section 703 of said Act, 42 U.S.C. § 2000e-2, when it discharged him solely on the ground of a racially-based physical characteristic without establishing a "business necessity" for such action.

Petitioner, a young black man, has a severe skin disorder called *pseudofolliculitis barbae. Pseudofolliculitis barbae* is caused by the tips of kinky Negroid facial hairs penetrating the skin surface and causing an inflammatory reaction. This reaction ranges from a few "razor bumps" to multiple papules and pustules, which can be very painful. For many victims, shaving increases the pain. Expert testimony at trial established that this disorder is peculiar to and is a racial characteristic of Negroid people.

Unless the disorder is properly treated, permanent disfigurement can result. In a severe case of *pseudofolliculitis barbae*, the only remedy may be temporary cessation of shaving until an individual treatment plan

can be devised by a dermatologist, as regular shaving can exacerbate the disorder. And in some severe cases, dermatologists' only known cure is indefinite abstinence from shaving. This case arose out of respondent's refusal to modify its grooming code to permit petitioner to wear a neatly-trimmed beard and its subsequent discharge of petitioner.

Petitioner was employed by respondent as a store clerk in the Hampton-Newport News area of Virginia. Prior to accepting employment with respondent, petitioner was employed as a store clerk at respondent's principal local competitor directly across the street from respondent's store. Only after petitioner had accepted respondent's job offer and resigned from respondent's competitor did respondent's store manager inform him that he was required to be clean shaven.[1] For several months the petitioner endeavored to comply with this code by shaving regularly. However, shaving exacerbated his condition and it became so severe that his dermatologist, a consultant to the United States Army, advised him to abstain from shaving indefinitely.

When petitioner's dermatologist first advised repondent of petitioner's condition and of his medical advice, respondent allowed petitioner to continue working without shaving. During this period, petitioner trimmed his beard regularly and continued to perform his duties in a diligent and capable manner.[2] None of respond-

[1] Respondent's grooming code is set forth in its entirety in Appendix C at p. 5a, n. 2.

[2] As a store clerk, petitioner's principal duties were to stock shelves, primarily with canned goods and paper products. A substantial portion of his duties were performed after the store had been closed for the day.

ent's customers ever complained about petitioner's appearance nor were his co-workers inconvenienced thereby.

After respondent had exempted petitioner from its grooming code for nearly six months, it discharged him for his continued inability to comply with its code. Thereafter, this action was initiated as an individual action seeking to establish that respondent's treatment of petitioner violated Title VII of the Civil Rights Act of 1964, as amended.

At trial, respondent attempted to justify its treatment of petitioner on the ground that the purposes of its grooming code were legitimate and petitioner was the only black discharged because of his inability to comply with the rule. Respondent presented testimony at trial that the purposes of its code were to provide clear guidance to its employees regarding its grooming standards and to restrict employment to those individuals who would "be objectionable to the least number of people in the community". Respondent also testified that petitioner was the only employee with such a severe case of *pseudofolliculitis barbae* that he could not comply with respondent's grooming code.

Petitioner, on the other hand, established that respondent permitted its store employees to wear other facial adornments such as mustaches, long sideburns, and Afros, and "to wear their hair at any length they prefer so long as it is kept clean and neat", even though these were not worn out of medical necessity; that no complaint was ever made by a customer about petitioner's appearance during the nearly six months that he continued to be employed by respondent while wearing a beard; that his beard presented no health hazard;

that at the time of trial the manager of the store at which petitioner had been employed was allowing a black employee to violate the rule without any showing of medical necessity; that respondent allowed other employees in a public contact job to grow beards; that a number of respondent's competitors in the Hampton-Newport News area allowed their store employees to wear beards; that respondent allowed its store employees in several other areas of the country to grow beards; and that the United States Army, Air Force and Marines allow servicemen with severe *pseudofolliculitis barbae* to grow short, well-trimmed beards prescribed by military dermatologists.[3]

The District Court found that respondent acted "to disqualify an otherwise qualified black from employment solely on the basis of a genetic characteristic peculiar to his race" (App. 16a). Despite this finding, however, it held that respondent had not violated Title VII "because the rule is justified by a legitimate business purpose" (App. 16a); it has "a relation to existing human preference scales" (App. 18a); and "the degree of impact of the employment practice in question is slight" (App. 18a). In short, the District Court decided that "a business purpose exists to support" respondent's rule and "the rationale behind the rule overrides the slight racial impact resulting therefrom" (App. 19a).

[3] In express recognition of this disorder, the rules of the United States Army allow servicemen with *pseudofolliculitis barbae* to grow a temporary and, in some cases, a permanent beard. TB MED 287, Department of the Army Technical Bulletin, "Pseudofolliculitis of the Beard," August 15, 1973.

The Air Force's policy as of September 21, 1973 permitted a well-trimmed beard of one-fourth inch in length where medically prescribed. AFM 35-10 (September 21, 1973). The Air Force's current policy is AFP 160-44 (August 1977).

The Marine Corps' policy as of July 9, 1975 permitted temporary beard growth not to exceed one-fourth inch where medically prescribed. Marine Corps Order 6310.1. The Marine Corps' current policy is Marine Corps Order 6310.1A (August 15, 1977). See Alexander & Delph, "Pseudofolliculitis Barbae in the Military: A Medical, Administrative and Social Problem," *Journal of the National Medical Association*, 66 J.N.M.A. 459 (1974).

The Fourth Circuit Court of Appeals affirmed for the reasons set forth in the District Court's decision (App. 1a-2a).

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The writ should be granted for two reasons. First, the decision of the court below in this case conflicts with decisions of this Court and several Courts of Appeals. Second, the decision presents an important federal question regarding the scope of the "business necessity" defense where an individual is denied employment solely on account of a physical characteristic that is directly traceable to race.

Racial discrimination can be established by demonstrating that an individual has been subjected to "disparate treatment" or "disparate impact" on account of race. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335-336 n. 15 (1977).[4] The

[4] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-806 (1973) (disparate treatment); *Furnco Construction Co.* v. *Waters*, 57 L.Ed. 957 (1978) (disparate treatment); *Board of Trustees of Keene State College* v. *Sweeney*, —— U.S. ——, 47 U.S.L.W. 3330 (November 13, 1978) (disparate treatment); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-432 (1971) (disparate impact); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 422, 425 (1975) (disparate impact); *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 137 (1976) (disparate impact); *Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1977) (disparate impact).

only non-statutory defense to a demonstration of racial discrimination that has been recognized by this Court in a "disparate impact" case is a counter-demonstration by the respondent of "business necessity". *Griggs* v. *Duke Power Co., supra,* 401 U.S., at 431; *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S., at 425 (1975). *Cf. Dothard* v. *Rawlinson, supra,* 433 U.S., at 329 (1977); *Los Angeles Dept. of Water and Power* v. *Manhart,* 435 U.S. 702, 716 n. 30 (1978).

In *Griggs* v. *Duke Power Co., supra,* 401 U.S., at 431, this Court held:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

See also *Los Angeles Dept. of Water and Power* v. *Manhart, supra,* 435 U.S., at 716 n. 30.

Thereafter, this Court indicated that the existence of a less discriminatory alternative that serves the employer's interests would defeat a "business necessity" defense. *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S., at 425.

Then, this Court held that in order to fulfill the "business necessity" test, the practice "must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge". *Dothard* v. *Rawlinson, supra,* 433 U.S., at 332 n. 14.

Lower courts have concluded that the defense of "business necessity" requires a demonstration by the employer that: (a) it has a business purpose for its

treatment of the individual that is necessary for the safe and efficient operation of its business;[5] (b) its treatment of the individual was necessary to achieve that business purpose;[6] and (c) the desired objectives cannot be achieved through a method which has less discriminatory impact.[7]

Here, petitioner proceeded under a "disparate impact" analysis and the court below found that petitioner had established that his exclusion from further job opportunities with respondent was directly traceable to his race. Having found that petitioner had sustained his initial burden in a "disparate impact" case, the court below held that proof by respondent of a "business purpose", rather than a "business necessity", was a sufficient defense where only one individual had been excluded from job opportunities on account of race.

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[5] See, *e.g., Waters* v. *Wisconsin Steel Works of Int'l. Harvester, Co.,* 502 F.2d 1309, 1321 (7th Cir. 1974), *cert. denied sub nom Bricklayers, Local 21* v. *Waters.* 425 U.S. 997 (1976) ("... [A]n employment practice 'can be justified only by showing that it is necessary to the safe and efficient operation of the business' ..."); *United States* v. *St. Louis-San Francisco Ry. Co.,* 464 F.2d 301, 308 (8th Cir. 1972) (*en banc*), *cert. denied sub nom United Transportation Union* v. *United States,* 409 U.S. 1116 (1973) (The discriminatory policy "must not only *foster* safety and efficiency, but must be *essential* to that goal".) (Emphasis in the original.)

[6] See, *e.g., United States* v. *Bethlehem Steel Corp.,* 446 F.2d 652, 662 (2nd Cir. 1971) ("Necessity connotes an irresistible demand.").

[7] See, *e.g., United States* v. *Bethlehem Steel Corp., supra,* 446 F.2d, at 662. ("If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued."); *Wallace* v. *Debron Corp.,* 494 F.2d 674, 677 (8th Cir. 1974).

By substituting a "business purpose" standard, the court below adopted what was rejected in *Griggs* and its progeny. Moreover, by substituting a "business purpose" standard because petitioner was the only individual before the court, the court below rejected in principle the recent holding of this Court that emphasizes that the Act is designed to protect individuals from unfair treatment linked to a protected characteristic.

> The statute makes it unlawful "to discriminate against any *individual* . . . because of such *individual's* race" . . . The statute's focus on the individual is unambiguous . . . Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes.

Los Angeles Dept. of Water and Power v. *Manhart, supra,* 435 U.S., at 708-709. (Emphasis in original).

Finally, the lower court ignored the plethora of evidence that demonstrated that alternatives short of discharge existed. In doing so, it ignored or misapplied the holdings of this Court in *Moody,* 422 U.S., at 425, where it held the existence of some less burdensome alternative requires that judgment be entered for the discriminatee. Here, the respondent could have achieved its business purposes by simply notifying petitioner's fellow employees and its customers that petitioner had been exempted because of medical necessity. Where the evidence at trial established that respondent had exempted an employee at the same store not for reasons of medical necessity, but rather because of personal preference, it would seem hard put to argue that its business purposes could not have been served equally well by that simple expedient.

Because there is an evident conflict between the decision below and the opinions of this Court and several Courts of Appeals, it would be highly desirable to have the issues resolved by this Court to eliminate confusion as to the allocation of burdens of proof in a "disparate impact" case and the meaning of "business necessity".

CONCLUSION

In *Griggs,* this Court forbade the use of "artificial, arbitrary and unnecessary barriers to employment", 401 U.S., at 431, and held that the Act is designed to make race irrelevant. 401 U.S., at 436. Here, the petitioner performed his duties and responsibilities as an employee in an "efficient and trustworthy" manner. *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S., at 801. Solely because of a physical characteristic that is directly linked to his race, he was unable to comply with respondent's grooming code. The decision below permits that racial characteristic to be determinative even though it was demonstrably "artificial, arbitrary and unnecessary". 401 U.S., at 431. Such treatment would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . ." *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 175 (1972). *Cf. Frontiero* v. *Richardson,* 411 U.S. 677, 686 (1973).

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Attorneys for Petitioner

December 5, 1978

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 1978, three copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit were sent by first class mail, postage prepaid, to James Patrick McElligott, Jr., of the firm of McGuire, Woods & Battle, 1400 Ross Building, Richmond, Virginia 23219.

/s/ ROBERT B. FITZPATRICK

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-2234

MR. ANDREW WOODS, *Appellant*,

versus

SAFEWAY STORES, INC., *Appellee*,

No. 76-2235

SAFEWAY STORES, INC., *Appellant*,

versus

MR. ANDREW WOODS, *Appellee*.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond, Robert R. Merhige, Jr., District Judge

Argued June 9, 1978 Decided July 24, 1978

Before WINTER and WIDENER, Circuit Judges, and THOMSEN*, Senior District Judge

Robert B. Fitzpatrick for Appellant in 76-2234 and for Appellee in 76-2235; James Patrick McElligott, Jr. (William H. King, Sr., John M. Oakey, Jr., McGuire, Woods & Battle on brief) for Appellee in 76-2234 and for Appellant in 76-2235.

* Senior District Judge for the District of Maryland, sitting by designation.

PER CURIAM:

In No. 76-2234, plaintiff below appeals from a judgment in favor of his former employer, Safeway Stores, Inc., rendered by the district court after a full trial on the merits of an action brought by plaintiff under Title VII of the Civil Rights Act of 1964, as amended. We affirm the judgment for the reasons fully and carefully stated by the district judge in discussing the merits of plaintiff's case. *Woods* v. *Safeway Stores, Inc.*, 420 F. Supp. 35 (E.D. Va. 1976).

This decision makes it unnecessary to reach the question of the timeliness of plaintiff's filing of his charge with the Equal Employment Opportunity Commission (EEOC), which the district judge decided in favor of plaintiff. Defendant's appeal, No. 76-2235, is therefore dismissed.[1]

No. 76-2234—Affirmed

No. 76-2235—Dismissed

[1] Plaintiff's motion for leave to file the affidavit of the Director of the Washington, D.C. office of EEOC has been granted.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-2234

MR. ANDREW WOODS, *Appellant*,

versus

SAFEWAY STORES, INC., *Appellee*,

No. 76-2235

ANDREW WOODS, *Appellee*,

versus

SAFEWAY STORES, INC., *Appellant*.

Order

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Thomsen for a panel consisting of Judge Winter, Judge Widener, and Judge Thomsen.

Filed September 6, 1978
U. S. Court of Appeals
Fourth Circuit

For the Court,
/s/ WILLIAM K. SLATE, II
CLERK

APPENDIX C

Filed July 15, 1976

Clerk, U. S. District Court
Richmond, Va.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 75-0321-R

ANDREW WOODS, *Plaintiff*,

v.

SAFEWAY STORES, INC., *Defendant*.

Memorandum

This action is brought by the plaintiff to redress an alleged violation of the provisions of Title VII of the Civil Rights of 1964, *as amended* 42 U.S.C. § 2000e *et seq.* Plaintiff seeks injunctive and other appropriate equitable relief including an award of back pay. Jurisdiction over the controversy is premised on § 706(f) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f), and by 28 U.S.C. § 1343(4).

The plaintiff, a black citizen of the United States, is a resident of the Commonwealth of Virginia. Defendant Safeway Stores, Inc. (hereinafter "Safeway") maintains a chain of retail grocery stores throughout the Commonwealth of Virginia, one of which, Store No. 365, is located in Hampton, Virginia. Safeway is a Maryland corporation with its principal office in Oakland, California and is an employer within the meaning of § 701(b) of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e-(b).

The Court makes the following findings of fact and conclusions of law:

In November, 1973, plaintiff, then 19 years of age, applied for a position at defendant's Store No. 365, Hampton, Virginia. Upon the recommendation of another black employee, he was hired by the store manager.[1] Pursuant to directions, he reported to work on Monday, November 12, 1973, and continued his employment at that facility until discharged on June 28, 1974. The basis of the discharge was the plaintiff's failure to adhere to the defendant's local employee grooming code;[2] the plaintiff grew a beard

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[1] The Court finds, however, that the plaintiff was not informed of the grooming regulations until he had given up other employment and had begun work at Safeway. Accordingly, the parties will be requested to submit briefs on whether, pursuant to this finding, the plaintiff may recover on any pendant state claims.

[2] The Safeway "Employee Handbook" contains the following passage:

> *Personal Appearance and Cleanliness.* Customers like to shop in a store where the atmosphere is friendly and helpful. In comparing one store with another, the customer may say that one has "personality" or a good image where the other is unfriendly or cold. Consistently well groomed and friendly employees help to create the image or "store personality" we seek. The customers recognize this atmosphere in a store and it influences their store selection.
>
> It is the responsibility of management to establish personal appearance and grooming standards so that employees will know what is expected of them. It is impossible and impractical to spell out every possible detail in this area. However, the general standard for our store employees are outlined and illustrated here in these pages. If you have any questions concerning these policy standards, you should discuss them with your manager.
>
> We should all strive to present our best personal appearance, and that is all that the Company asks or wants.
>
> • • •
>
> *Personal Appearance Male Store Employee.*
>
> • • •
>
> Face must be smooth shaven. Mustaches are permitted, but if worn should not extend below the lower lip. Goatees of any style are not permitted. . . .

on advice of his dermatologist in the treatment of a condition of pseudofolliculitis barbae ("PFB"), a condition that afflicts, almost exclusively, members of the black race.

On July 2, 1974, through Local 233 of the Retail Clerks International Association, plaintiff filed a grievance against the defendant. Subsequent to an appropriate hearing, and in a decision dated December 4, 1974, the arbiter found against the plaintiff. No allegation had been made in that proceeding of racial discrimination; the sole issue before the arbiter was whether the plaintiff had been discharged for proper cause.

On December 30, 1974, plaintiff filed a sworn charge with the Equal Employment Opportunity Commission ("EEOC") against the defendant in which he alleged that his discharge was racially discriminatory. On July 7, 1975, the EEOC issued to the plaintiff a notice-of-right-to-sue letter which he received on July 9, 1975. *See* § 706(f)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1). Thereafter, on July 14, 1975, plaintiff filed this action. Section 706(e) of the Act, 42 U.S.C. § 2000(e)-5(e), requires a charging party to file a charge with the Equal Employment Opportunity Commission "within 180 days after the alleged unlawful employment practice occurred . . ." The date of discharge as to the plaintiff was June 10, 1974. It was not until 203 days later, December 30, 1974, that plaintiff filed a charge against the defendant. Ordinarily, in the absence of a tolling of the requirements of Section 706(e), plaintiff's instant claim would be time barred. *See Burwell* v. *Eastern Airlines, Inc.*, 68 F.R.D. 495 (E.D.Va. 1975). For reasons which follow, however, the Court, while of the view that resort to the grievance process does not toll the limitations period, holds that the plaintiff's claim is nevertheless not time barred.

Prior to the Supreme Court's rulings in *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975), and *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), with few

exceptions courts that had occasion to address the issue concluded that the filing of a labor grievance procedure did toll the filing time requirements of the Civil Rights Act of 1964. *E.g.*, *Sanchez* v. *Trans World Airlines, Inc.*, 499 F.2d 1107 (10th Cir. 1974); *Moore* v. *Sunbeam Corp.*, 459 F.2d 811, 826-27 (7th Cir. 1972); *Malone* v. *North American Rockwell Corp.*, 457 F.2d 779 (9th Cir. 1972); *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970). *Cf. Reynolds* v. *The Daily Press, Inc.*, 5 EPD ¶ 7991 (E.D. Va. 1972) (dicta); *Phillips* v. *Columbia Gas of West Virginia, Inc.*, 347 F. Supp. 533, 538 (S.D.W.Va. 1972) (dicta), *aff'd*, 474 F.2d 1342 (4th Cir. 1973). Subsequent to the aforementioned Supreme Court rulings, however, courts reconsidered, holding that the filing of a grievance will not toll the jurisdictional requirements of the Act. *Guy* v. *Robbins & Myers, Inc.*, 525 F.2d 124 (6th Cir. 1974), *cert. granted* (1976); *Roberts* v. *Lockheed Aircraft Corp.*, 11 FEP Cases 1440 (C.D. Calif 1975), *reconsidered and vacated on other grounds*, (C.D. Calif., Feb. 5, 1976). *But see Caldwell* v. *Seaboard Coast Line Railroad*, C.A. No. C-C-75-133 (W.D.N.C. April 8, 1976).

In *Alexander* v. *Gardner-Denver Co.*, *supra*, the Supreme Court held that an individual is entitled to a de novo consideration of his/her Title VII cause of action in spite of the fact that he/she has pursued a labor grievance procedure to its completion. While that case is not dispositive of the question presented in the instant action, it does contain colorable language on the relationship between Title VII and the grievance process of collective-bargaining agreements.

> Title VII does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements. It does, however, vest federal courts with plenary power to enforce the statutory requirements; and it specifies *with precision* the jurisdictional prerequisites that an individual must satisfy before he is entitled to insti-

tute a lawsuit. In the present case, these prerequisites where met when petitioner (1) filed *timely* a charge of employment discrimination with the Commission and (2) received and acted upon the Commission's statutory notice of the right to sue. 42 U.S.C. §§ 2000e-5(b), (e), and (f).

415 U.S. at 47. (Emphasis added).

In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractural and statutory rights is not officiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.

415 U.S. at 49-50.

Both rights have legally independent origins and are equally available to the aggrieved employee.

415 U.S. at 52.

[I]n instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process.

415 U.S. at 54. The Court in that case specifically and emphatically noted that the arbitration process established in collective bargaining agreements and the adjudication process established in Title VII of the Civil Rights Act of 1964 are completely distinct and independent processes.

In *Johnson* v. *Railway Express Agency, supra,* it was held that the timely filing of an employment discrimination charge with the EEOC, pursuant to § 706 of Title VII of the Civil Rights Act of 1964, did not toll the running of the limitation period applicable to an action based on the same facts brought under the Civil Rights Act of 1866, 42 U.S.C. § 1981. The Court noted that since there is no relevant federal statute of limitations for a cause of action under § 1981, the controlling period was one provided in that instance by the law of Tennessee. It was noted that Tennessee statutes explicitly provided no tolling exceptions applicable to the case, and that a failure to toll the limitation period in issue would not seriously conflict with the purposes of Title VII.

Petitioner argues that a failure to toll the limitation period in this case will conflict seriously with the broad remedial and humane purposes of Title VII. Specifically, he urges that Title VII embodies a strong federal policy in support of conciliation and voluntary compliance as a means of achieving the statutory mandate of equal employment opportunity. He suggests that failure to toll the statute on a § 1981 claim during the pendency of an administrative complaint in the EEOC would force a plaintiff into premature and expensive litigation that would destroy all chances for administrative conciliation and voluntary compliance.

. . . But the fundamental answer to petitioner's argument lies in the fact—presumably a happy one for the civil rights claimant—that Congress clearly has retained § 1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII.

421 U.S. at 465-66. The Court continued, perhaps revealing its overriding philosophy of the case in footnote 13:

> We expressly note how little is at stake here. We are not really concerned with the broad question whether these respondents can be compelled to conform their practices to the nationally mandated policy of equal employment opportunity. If the respondents, or any of them, presently or actually engaged in such conduct, there necessarily will be claimants who are in a position now either to file a charge under Title VII or to sue under § 1981. The question in this case is only whether this particular petitioner has waited so long that he has forfeited his rights to assert his § 1981 claim in federal court.

421 U.S. at 467 fn. 13. Mr. Justice Marshall, with whom Justices Douglas and Brennan joined, dissented in part contending that the majority's failure to apply the tolling principle undermines the foundation of Title VII and frustrates the congressional policy of providing alternative remedies. "Forced compliance with a short statute of limitations during the pendency of a charge before the EEOC would discourage and/or frustrate recourse to the congressional favored policy of conciliation." 421 U.S. at 472.

Additionally, the majority rejected the argument that the timely filing of a charge with the EEOC has the effect of placing the charged employer on notice that a claim of discrimination is being asserted, thus alleviating the need for strict adherence to the limitations period. "Only where there is *complete identity* of the causes of action will the protections suggested by petitioner necessarily exist and will the courts have an opportunity to assess the influence of the policy of repose inherent in a limitation period." 421 U.S. at 467, fn. 14. (Emphasis added).

The import of the *Johnson* case is apparent; the policies behind Title VII do not support an argument for the tolling of a limitation period based solely on the pursuit of an independent remedy. Since the Supreme Court concluded

in *Alexander* that labor arbitration and Title VII adjudications are distinct and separate procedures, it would be inappropriate for this Court to hold that an arbitration proceeding does toll the limitations period congressionally enacted in Title VII.

The plaintiff has attempted to distinguish the *Johnson* holding on several grounds. First, it is argued that *Johnson* involved only a judgment on the values implicit in the Tennessee statute of limitation applied to 42 U.S.C. § 1981, and was not an evaluation of the policy behind Title VII. The language of the opinion is clearly to the contrary. *E.g.*, 421 U.S. at 465-66. Second, it is argued that the policy of encouraging "in-house" resolution of claims through arbitration before the administrative machinery of the EEOC is engaged, is stronger than the policy of encouraging EEOC action before resort to the courts under § 1981. However, the answer to the former position applies with continued force to the latter—Congress clearly has created a remedy in Title VII that is separate and distinct from labor-agreement arbitration; it would be inimical to this independency to have one remedy toll the operation of the other. *E.g.*, 421 U.S. at 465-66. Furthermore, while the court's holding may encourage employees to file grievances with the EEOC before arbitration is concluded, there is clearly room in the Title VII procedure for a court to stay any judicial action on a Title VII allegation until the arbitration has concluded. The end result therefore may not increase litigation in the courts, although it may well increase the number of *concurrent* EEOC administrative and labor arbitration proceedings. It is not at all clear that arbitration will be avoided, as is contended by the plaintiff. Third, it is argued that the purposes and rationales behind any limitation period have been satisfied by the prior resort to arbitration; the employer has been put on notice of the claim and may take steps to preserve his case. The Supreme Court has held, however, that the claims must be identical for the position to have substance. 421 U.S. at

566-67, fn. 14. In the instant action, the arbitration did not involve any claims of racial discrimination, and it can hardly be said that the arbitration proceeding put the employer on notice of the claims asserted in the instant suit. In a very real sense, the plaintiff "slept" on his claims of racial discrimination. Finally, it should be noted that there are no claims of government or employer delay or inducement to delay; the facts are plain—the plaintiff simply did not file within the specified time limit.

The plaintiff's final contention in this regard, and one in which the Court concurs, is that if the Court holds as it does that the limitations period is not tolled by a resort to the grievance process under the principles of the *Johnson* decision, the holding should be given only prospective application from the date of the decision in *Johnson*. It is urged that since *Johnson* was decided in May of 1975, and the plaintiff filed his sworn charge with the EEOC in December of 1974, *Johnson* principles ought not be applied to the plaintiff so as to bar his claims in the instant action. Non-retrospectivity is controlled by the standards enumerated in the Supreme Court's holding of *Chevron Oil Company* v. *Hudson*, 404 U.S. 97, 106-07 (1971):

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively was to establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . Second, it has been stressed that we "must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this court could produce substantial inequitable results if acquired retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

(Citations omitted). Since (1) all previous authority on the issue had held that the pursuit of arbitration pursuant to a collective-bargaining agreement does toll the limitations period specified in Title VII, (2) the plaintiff would clearly be prejudiced by retroactive application, as his claim would be lost, and (3) Title VII evinces a strong policy in favor of airing employment discrimination grievances, this Court is satisfied that the *Johnson* principles, as applied in the instant case, should be given prospective effect from the date of that decision. *See Roberts* v. *Lockheed Aircraft Corp.*, Nos. 75-3093-JWC, 75-3095-JWC, 75-3111-JWC, 75-3112-JWC (C.D.Calif., Feb. 5, 1976), *Hambrick* v. *Royal Sonesta Hotel*, 403 F. Supp., 943, 944-45 (E.D.La. 1975); *Bush* v. *Wood Brothers Transfer*, 398 F. Supp. 1031 (S.D.Tex. 1975). Accordingly, the plaintiff will be considered as having filed a timely sworn charge with the EEOC.

Turning now to the merits of the controversy, it is plaintiff's position that he was discharged by the defendant on the basis of racially tainted criteria. Defendant's regulations on grooming[3] that included a prohibition against beards in its retail stores were admittedly violated by the plaintiff in his efforts to cure a skin condition—PFB. The violation led to his dismissal. PFB, colloquially known as "razor bumps" or "shaving bumps," is a condition far more common and much more severe among blacks than members of other races. It is caused by the ingrowing of hairs in the beard area of the face and neck. Regular shaving with a sharp blade is usually the precipitating stimu-

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[3] See footnote 2 *supra*.

lus, the hairs become sharpened points, and the natural curvature of the hair and the hair follicle—aggravated in blacks—facilitates ingrowth. Papules form where the hair is ingrown as the result of an inflamatory [sic] foreign body reaction. In severe reactions, papules may become pustules and subsequently abscesses. If the condition is not treated, a danger of permanent disfigurement of the fact exists. The evidence satisfies the Court that in its severe form, PFB is peculiar to blacks.

The plaintiff, in an effort to conform with the defendant's grooming regulations, began by procuring shaves with electric clippers at a local barber shop. Understandably, the costs proved to be prohibitive. He thereafter attempted to remove his facial hair with a depilatory—a powder or cream that dissolves the hair above the skin line. The depilatory in plaintiff's instance caused his skin to redden and develop "bumps." He thereafter attempted to shave once with a bladed razor and twice with an electric razor but both techniques aggravated the inflamation [sic] of his skin. Plaintiff thereafter returned to the use of a depilatory and sought the assistance of a dermatologist. His dermatologist diagnosed his infliction as PFB, instructed him to discontinue shaving, and provided him with an explanatory note to his employer. Subsequent visits by the plaintiff to his dermatologist resulted in the same recommendation. Despite his doctor's letters and verbal communications of explanation, Safeway terminated plaintiff on account of the fact that he had a beard and hence was in violation of its grooming code.

The testimony of experts introduced at trial gives rise to a conclusion that from 45% to 55% of all black males are afflicted with a form of PFB, although the number affected by its severe stages is limited, and that the affliction is typically caused by cutting or clipping the hair close to the skin so as to create a hair lance that is, by curving

growth, forced back into the skin. Furthermore, most blacks can avoid the condition by using a depilatory appropriately and in a timely fashion, or by having a barber shave them with the use of clippers. Once the affliction, however, has been contracted, treatment typically consists of growing the hair out into a beard until irritation subsides. It was estimated by at least one dermatologist that of those suffering from the condition 20-22% needed beard therapy. A second method, apparently preferred by doctors but usually not prescribed because of its tediousness, is to pluck individually the ingrown hairs from the skin. Thereafter, the skin is medically treated.

There is no contention here that Safeway adopted its growing standards with the purpose or intent to discriminate against black employees. Indeed, until the filing of the complaint with the EEOC, there is nothing in evidence to indicate that Safeway had any knowledge of the condition known as PFB. Furthermore, the evidence is undisputed that Safeway applies that "no beard" policy uniformly to both white and black males. Plaintiff argues, however, that the grooming regulation *operates* to deprive him of employment on racially tainted criteria, and, accordingly, is a violation of § 703 of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e-2:

> (a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individuals with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of

> such individual's race, color, religion, sex, or national origin.

The statute has been interpreted to prohibit even racially neutral employment practices if same have a significantly disparate impact on members of a distinct racial group, and if they cannot be justified by proven business necessity.

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.
>
> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

Griggs v. *Duke Power Company,* 401 U.S. 424, 431 (1971). See also *Gilbert* v. *General Electric Company,* 519 F.2d 661, 664 (4th Cir. 1975); *Wallace* v. *Debron Corporation,* 494 F.2d 674 (8th Cir. 1974); *Gregory* v. *Litton Systems, Inc.,* 472 F.2d 631-32 (9th Cir. 1972). The evidence adduced in the instant case does establish that the "no beard" policy can act to disqualify an otherwise qualified black from employment solely on the basis of a genetic characteristic peculiar to his race.

The Court concludes, however, that although some discriminatory impact may result from the "no beard" regulation, it does not violate the Act because the rule is justified by a legitimate business purpose. The business purpose doctrine was best stated for this jurisdiction by the late Judge Sobeloff in *Robinson* v. *Lorillard Corp.,* 444 F.2d 791, 798 (4th Cir. 1971):

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; carry out the business purpose it is alleged to serve; and there must be available no acceptable or alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact. (Footnotes omitted).

Of necessity, however, the doctrine's application will vary with (1) the nature of the business involved, (2) the business practice employed, and (3) the degree of the discriminatory impact. In the *Robinson* case, for example, the Court dealt with a discriminatory seniority system in a tobacco plant. The system acted to continue the effects, for numerous employees, of a past history of intentional hiring discrimination. The Court, quite understandable, applied a fairly stringent business purpose doctrine test.

In the instant case, the business involved is the retail food business, a highly competitive multi-denominational industry. Since the product sold is intended, for the most part to be consumed, overall store hygiene and an appearance of cleanliness is an important aspect of customer preference. It was the judgment of of the Safeway management tending stores in the Virginia area, that a grooming code, maintaining an image of cleanliness, was necessary to attract and retain customers. The code was carefully drafted to prevent misunderstandings and any misuse of regulations by both employer and employee. The right of an employer to maintain grooming standards has been upheld in a plethora of Title VII litigation. *E.g., Brown* v. *D.C. Transit System, Inc.,* 523 F.2d 725 (D.C. Cir. 1975); *Willingham* v. *Macon Telegraph Publishing Co.,* 507 F.2d 1084 (5th Cir. 1975) (en banc); *Baker* v. *California Land Title Company,* 507 F.2d 895 (9th Cir. 1974); *Dodge* v. *Giant Food, Inc.,* 488 F.2d 1333 (D.C. Cir. 1973); *Fagan* v. *Na-*

tional Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1972); *Boyce* v. *Safeway Stores, Inc.*, 351 F.Supp. 402 (D.D.C. 1972); *Baker* v. *California Land Title Co.*, 349 F. Supp. 235 (C.D. Calif. 1972). The defendant, exercising sound business judgment, concluded that a "no beard" rule was a necessary part of its grooming code.

It is of little consequence that other Safeway divisions in other parts of the country, or that other stores within the Hampton area permit their retail store employees to wear beards. The Court finds that it was the legitimate business decision of the defendant, reflecting on the local clientele, to prohibit beards in its Virginia stores, and that decision must be given appropriate deference. This is not to say, however, that appearance codes with provisions that have no basis or foundation in past history or practice, will be respected if discriminatory impact is shown. It is only those provisions that have a relation to existing human preference scales which will be countenanced.

Furthermore, in applying the business purpose standard, consideration must be given to the fact that the degree of impact of the employment practice in question is slight. The sole black that has been prejudiced by the "no beard" regulation appears to be the plaintiff, even though Safeway has a number of other black employees. The testimony at trial satisfied the Court that a substantial majority of black males either do not have PFB or can cope with it and continue to shave their faces if care is taken. The regulation is neutral on its face; no discriminatory intent was manifest, and no past discriminatory practice is perpetuated. Finally, it must be noted that Safeway did not rigidly apply the "no beard" policy. It permitted the plaintiff to continue to work for some time despite his beard, by scheduling his time to minimize customer contact, in the hope that the condition would improve. Plaintiff's termination was accompanied with a stipulation that he would be reinstated if the condition was corrected. Additionally, plaintiff was offered work in the defendant's

warehouse, an area which did not require public contact and, therefore, had no grooming code. The location of the warehouse, however, proved to be a substantial distance from the plaintiff's home and was not a financially feasible alternative.

In conclusion, the Court finds that a business purpose exists to support defendant's "no beard" rule, and that the rationale behind the rule overrides the slight racial impact resulting therefrom.

A appropriate order will issue.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date: July 15, 1976